STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE RAY JUNIOR,

Defendant-Appellant.

UNPUBLISHED
October 3, 2006

No. 262378
Wayne Circuit Court
LC No. 05-001341

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530, and felonious assault, MCL 750.82. Pursuant to MCL 769.12, he was sentenced as a fourth habitual offender to concurrent prison terms of six to 20 years and three to ten years. Defendant now appeals as of right. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant's sole claim on appeal is that his dual convictions violate the constitutional prohibition against double jeopardy. Because defendant did not raise this issue below, it is unpreserved for appeal. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). The issue is therefore reviewed for plain error that affected defendant's substantial rights. *Id*.; *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The constitutional prohibition against double jeopardy protects against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Under the federal Double Jeopardy Clause, whether convictions violate the prohibition against multiple punishments for the same offense is determined by reference to the same-elements test established in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *People v Ford*, 262 Mich App 443, 448; 687 NW2d 119 (2004). The *Blockburger* test asks whether each crime contains an element that is not contained in the other; if not, the two crimes constitute the "same offence" and double jeopardy bars additional punishment or successive prosecution. *Id*., citing *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993).

"The test to determine whether multiple punishments may be imposed is the same under both the federal Double Jeopardy Clause and the Michigan Double Jeopardy Clause." *People v Meshell*, 265 Mich App 616, 629; 696 NW2d 754 (2005). Whether two convictions involve the

same offense for purposes of the protection against multiple punishment is solely a question of legislative intent. *Id*. "A presumption arises under *Blockburger* that a legislature intends multiple punishments where two distinct statutes cover the same conduct but each requires proof of an element the other does not . . . ." *Ford, supra* at 448-449.

"When ascertaining the intent of the Legislature in enacting criminal statutes, this Court has traditionally considered several factors." *People v Griffis*, 218 Mich App 95, 101; 553 NW2d 642 (1996).

> We look to whether the respective statutes prohibit conduct violative of distinct social norms, the punishment authorized by the statutes, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. Comparison of the elements of the offenses is often a useful tool. [*Id*. (internal citations omitted).]

"[S]tatutes prohibiting conduct that violates distinct social norms can generally be viewed as separate and as permitting multiple punishment." *People v Kaczorowski*, 190 Mich App 165, 169; 475 NW2d 861 (1991).

Unarmed robbery requires an unarmed assault in the course of committing a larceny from a person. MCL 750.530(1). Felonious assault requires use of a dangerous weapon to commit an assault. MCL 750.82(1). Each crime thus contains an element that is not contained in the other crime. While unarmed robbery contains the element of larcenous intent or a taking of property, felonious assault requires the use of a weapon. Because it is possible to commit one of these offenses without also committing the other, we presume under *Blockburger* that the Legislature intended multiple punishments. *Ford*, *supra* at 448-449.

In *People v Yarbrough*, 107 Mich App 332, 335; 309 NW2d 602 (1981), we held that because an assault with a dangerous weapon was used to accomplish a simultaneous larceny from a person, double jeopardy prohibited convictions for both armed robbery and felonious assault. However, we note that while armed robbery and felonious assault both contain an element requiring the use of a weapon, unarmed robbery contains no such element. Moreover, both the armed robbery conviction and felonious assault conviction in *Yarbrough* were based on the same assaultive conduct. *Id*. Therefore, neither of the offenses in that case was completed before the other began, and it could not be said that the defendant's two convictions were based on two separate and distinct criminal acts. *Id*.

Unlike the simultaneous nature of the offenses in *Yarbrough*, the evidence in the present case revealed that defendant had already accomplished the unarmed robbery before resorting to a separate and independent use of force. The unarmed robbery was complete when defendant physically fought with the victim in an attempt to retain possession of the stolen property. It was not until after that point that defendant struck the victim with various items fashioned as weapons. Double jeopardy protections are not violated "if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

In short, defendant has failed to demonstrate that plain error affecting his substantial rights occurred in this case. *Matuszak*, *supra* at 47.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper